

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
. Detroit, Michigan
Debtor. . September 19, 2013
3:00 p.m.
.

EXCERPT OF HEARING RE. MOTION BY OFFICIAL COMMITTEE OF
RETIREES TO STAY DEADLINES AND THE HEARINGS CONCERNING A
DETERMINATION OF ELIGIBILITY PENDING DECISION ON MOTION TO
WITHDRAW THE REFERENCE; MICHIGAN COUNCIL 25 OF THE AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
AND SUB-CHAPTER 98, CITY OF DETROIT RETIREES' MOTION TO
COMPEL TESTIMONY OF KEVYN ORR AND ALL OTHER CITY AND STATE
WITNESSES REGARDING CITY-STATE COMMUNICATIONS PRIOR TO
JULY 17, 2013
(MOTION TO COMPEL TESTIMONY)
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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2 uniform that it is state law that drives that determination,
3 not federal law.

4 And the fourth point I would like to make to your
5 Honor is that the huge difference between the Chrysler case
6 and this case is that, in fact, you could bond an appeal in
7 the Chrysler situation and stop the disposition of the
8 assets, and here there is no bonding of an appeal from an
9 eligibility determination. 921 says that's impossible.

10 Thank you, your Honor.

11 THE COURT: All right. The Court will take this
12 under advisement and issue a written opinion hopefully in the
13 next few days, so let's turn our attention then to the motion
14 to compel filed by AFSCME. Ms. Levine, are you going to
15 argue that?

16 MS. LEVINE: Thank you, your Honor. Sharon Levine,
17 Lowenstein Sandler, for AFSCME. Your Honor, I'm almost a
18 little bit sorry that we have to be here again on a discovery
19 dispute. Our hope was and we thought we had made it clear in
20 connection with our response to the motion to quash is to
21 really just get an understanding of the events that led up to
22 the filing on July 17th and July 18th, and we're, frankly, a
23 little bit dismayed that your Honor issued a scheduling order
24 on August 2. We filed in compliance our objection on August
25 19th. We gave notice to the world of the discovery that we

1 wanted to take and the depositions that we wanted to take on
2 August 23. It took awhile to reach agreement with the city
3 with regard to limiting those depositions and a schedule for
4 those depositions. We had to confront the motion to compel
5 by the state. Your Honor issued a decision.

6 THE COURT: The motion to quash?

7 MS. LEVINE: Sorry. Issued a decision on the motion
8 to quash on the 10th. We overcame through a meet and confer
9 on the 9th the -- on the 10th an opposition that was filed on
10 the 9th with this so-called deliberative privilege. Now,
11 according to the response that was filed by the city to this
12 motion, we learned that they drew up a common interest
13 agreement on the 12th. We rushed to take a deposition to
14 accommodate Mr. Orr's availability on the 16th, having gotten
15 literally thousands of documents over that weekend, only to
16 learn that there was, in essence, a new privilege that they
17 were claiming that was substantially the same in breadth as
18 the deliberative process privilege, which prevented us from
19 questioning Mr. Orr on precisely the scope of information
20 that we had clearly identified was what we were looking for,
21 so I'd ask your Honor to let us rederepose him very briefly on
22 just those issues and to also ask everybody to identify for
23 us if I'm just not knowing what the privilege of the month is
24 so that we can know that on a go forward basis the privilege
25 is attorney-client privilege and/or work product privilege,

1 but if there is another privilege that I'm omitting, I'm just
2 not smart enough to think of as we're standing here today,
3 I'm asking to have it identified so that we can address it
4 and discuss it with the Court before we go forward with more
5 depositions that potentially just result in having the
6 witness directed not to answer.

7 Your Honor has read everything, as far as I can
8 tell, every time we've been here, so unless you need me to
9 run through the case law, we would look to the Court for some
10 direction.

11 THE COURT: Well, I think it would be helpful to
12 hear your -- how you deal with the privilege claim that was
13 made, this --

14 MS. LEVINE: Your Honor --

15 THE COURT: -- common interest claim.

16 MS. LEVINE: -- we understand that when there's a
17 common legal theory and you're really truly doing a joint
18 defense to a litigation that the defendants often confer in
19 terms of what is tantamount to work product and litigation
20 strategy, but when you're dealing with an issue like
21 eligibility and the core inquiry in connection with the
22 eligibility is the good faith and/or to the extent we -- you
23 know, we haven't yet grappled with that, but to the extent
24 there are factual issues with regard to the as applied issue
25 of authority, these are -- this is the very nature of

1 proving -- their proving good faith and authorization and our
2 ability to challenge that good faith and authorization, so
3 when we're dealing with this commercial kind of issue, this
4 factual kind of issue, we respectfully submit that it's
5 different than simply launching a defense on a common legal
6 theory to a litigation claim.

7 THE COURT: Um-hmm. Okay.

8 MS. LEVINE: Unless your Honor has any questions,
9 thank you.

10 MR. BENNETT: Bruce Bennett, Jones Day, on behalf of
11 the city. I think -- I don't understand the preamble because
12 I think we're overstating matters just a little bit. There's
13 been a lot of cooperation in discovery. Everybody has been
14 able to get the depositions they need taken. There was a
15 waiver of one privilege, which was the deliberative process
16 privilege, and then Mr. Orr was deposed. This is the
17 transcript, and I don't know if your Honor looked at it, but
18 this is really bad for old people like me because the type is
19 unbelievably tiny. This is a huge transcript. There are
20 disputes over 12 questions or 11 questions. I can't remember
21 exactly how many there are, but that's it in this whole -- I
22 don't remember -- 135-page times four transcript, so that's
23 first of all. We have, in fact, the demonstration of a very
24 cooperative discovery process with no material obstruction
25 and a disagreement over 12 questions or 11 questions or

1 however many it is.

2 It wasn't a secret to them that the attorney-client
3 privilege was going to be claimed by everybody. No one
4 waived any aspect of the attorney-client privilege, and that
5 is the privilege that was invoked. Their assertion is you've
6 waived the attorney-client privilege by reason of the fact
7 that there was a discussion between Mr. Orr and the governor
8 and a lawyer.

9 THE COURT: Don't jump there. Start me in baby
10 steps here.

11 MR. BENNETT: Okay.

12 THE COURT: What questions did Mr. Orr refuse to
13 answer, and what was the basis for claiming a privilege in
14 support of that refusal?

15 MR. BENNETT: Okay. First one is -- here's the
16 exact question. You're going to want me to read a little bit
17 before that. "Okay." Question: "Okay. What did you
18 discuss about the litigation with braid" -- and there's the
19 word "error" there, which I don't think is right, but I think
20 that's somebody else's name -- "and Gadola?" That was
21 objected. The person was a lawyer, and so I think we're
22 talking --

23 THE COURT: Which person was a lawyer?

24 MR. BENNETT: Gadola is a lawyer; correct? Gadola
25 is lawyer. So there was a -- apparently a meeting

1 involving -- okay. You got to go further. Oh, Brader is the
2 other person. Valerie Brader and Mike Gadola were the two
3 persons.

4 THE COURT: So those two are lawyers.

5 MR. BENNETT: For --

6 THE COURT: Whose lawyer?

7 MR. BENNETT: For the state.

8 THE COURT: They're the state's lawyers, so Orr is
9 being asked about a conversation with lawyers for the state?

10 MR. BENNETT: I think the governor was also in the
11 room. Is that the --

12 MS. LEVINE: Your Honor, we're not asking for
13 conversations between Mr. Orr and his counsel and Jones Day.

14 THE COURT: That was going to be my next question.

15 MS. LEVINE: Okay. What we're --

16 THE COURT: But who else was there?

17 MR. BENNETT: I have to read back.

18 THE COURT: Let's assume for a minute the governor
19 was not there. Why is Mr. Orr's conversations with someone
20 else's lawyers protected by the attorney-client privilege?

21 MR. BENNETT: Well, because, as we set forth in our
22 papers, it's not just anyone else. The governor, of course,
23 appointed Mr. Orr but also can remove Mr. Orr. There is
24 the -- the state government has a series of continuing ties
25 to the things Mr. Orr can do, including approving

1 expenditures of over \$50,000, and there's a whole bunch of
2 other different things. They're all -- the list is in our
3 papers. He is paid by the state, by the way, and his
4 protective detail is provided by the state. I think the sum
5 total of that under the state law is they're supposed to be
6 coordinating, and, quite frankly, I think this Court wants to
7 encourage them to be coordinating. And if they're going to
8 be coordinating and they're going to be talking about legal
9 issues, those discussions should be privileged. They clearly
10 have a common interest. None of the cases define it as a
11 common legal theory. The cases talk about interests relating
12 to legal things, and, quite frankly, we believe that the
13 entire fiscal emergency and all of the solutions to it -- in
14 this period we're talking about out-of-court solutions
15 potentially -- there's no Chapter 9 had been filed yet --
16 those conversations have to be privileged, that the governor
17 has to be able to talk to Mr. Orr's lawyers, and Mr. Orr has
18 to be able to talk to the governor's lawyers. And, frankly,
19 Mr. Orr's lawyers and the governor's lawyers have to be able
20 to talk to each other, too, in an environment where what they
21 say can't be invaded by others so that they can talk about
22 with candor all of the things not only that they're thrilled
23 about but things that they're bothered by.

24 THE COURT: What other questions, or does that
25 discussion cover all of those?

1 MR. BENNETT: That discussion I think covers all of
2 the questions, but I'm happy to go through them. They're
3 hard -- they're going to be tough for me to read, but I can
4 find them all. They're highlighted.

5 THE COURT: But what we're looking for are questions
6 that were asked of Mr. Orr other than of discussions he had
7 with these two attorneys who were attorneys for the governor.

8 MR. BENNETT: I think that's all the ones that were
9 objected to. Were there others?

10 MS. LEVINE: Your Honor, basically the problem is,
11 though, that the line of questioning was shut down because
12 what we were trying to understand was the -- you know, the
13 conversations that took place between the emergency manager
14 and the state, the governor and his inner circle, leading up
15 to the filing of the Chapter 9 petition.

16 THE COURT: Unfortunately, I've just been advised
17 that in order for your statements to be on the record, I need
18 to have you near a microphone and preferably the podium.
19 Preferably the podium, please. So let me just try to pin it
20 down as efficiently as we can here. You want to ask
21 questions of Mr. Orr about his conversations with individuals
22 who were attorneys for the governor.

23 MS. LEVINE: Your Honor, what we're looking -- we're
24 not looking to -- there's the state and its attorneys --

25 THE COURT: Right.

1 MS. LEVINE: -- and there's the city and its
2 attorneys.

3 THE COURT: Right.

4 MS. LEVINE: But any combination of those, our view
5 is that's not an attorney-client privilege. In other words,
6 if I talk to --

7 THE COURT: Right. So that was my -- that was my
8 question. You want to --

9 MS. LEVINE: That's really what we --

10 THE COURT: You want to ask him questions about his
11 conversations with the governor's attorneys and with the
12 governor --

13 MS. LEVINE: Yes.

14 THE COURT: -- but not necessarily about his
15 conversations with his own counsel.

16 MS. LEVINE: Correct. No, no. I'm not looking to
17 ask the governor what he said to his lawyer --

18 THE COURT: Or Mr. Orr --

19 MS. LEVINE: -- or what he might have heard --

20 THE COURT: Yeah.

21 MS. LEVINE: -- the governor say to his lawyer.

22 THE COURT: Okay.

23 MS. LEVINE: I'm not looking for two-party attorney-
24 client privilege conversations. We disagree with the concept
25 that there's a four-party attorney-client privilege.

1 THE COURT: Okay. Okay. So, Mr. Bennett, you
2 addressed why you think there's attorney-client privilege
3 that protects Mr. Orr from testifying about his conversations
4 with the governor's lawyers. How about his conversations
5 with the governor himself?

6 MR. BENNETT: Mr. Shumaker did not object to any
7 questions that were asked about the -- the conversations
8 between the governor and Mr. Orr where lawyers were not
9 present were never objected to. All of these questions deal
10 with questions about meetings that were attended by a lawyer
11 for the governor.

12 THE COURT: All right. So why would every question
13 that Mr. Orr might be asked about his conversation with the
14 governor even when a lawyer was present be privileged?

15 MR. BENNETT: Well, it might not be, but the first
16 question I started with -- and, frankly, I think it's up to
17 my opponent to point out a question that wasn't like this --
18 "Okay. What did you discuss about the litigation with" --
19 and it must have been Brader now that I see this -- "and
20 Gadola?" And I have to tell you I can't think of a more
21 privileged question in the world.

22 THE COURT: Well, but that wasn't my question.

23 MR. BENNETT: I know that. I don't know what the
24 other one -- I don't know which other questions, whether -- I
25 don't know whether any question was asked.

1 THE COURT: Well, but Ms. Levine says that the line
2 was shut down.

3 MR. BENNETT: Actually, your Honor, that's just not
4 true. If your Honor wants to read ----

5 THE COURT: All right. I don't want --

6 MR. BENNETT: -- the deposition transcript, you will
7 find that all --

8 THE COURT: I don't even want to go there.

9 MR. BENNETT: Okay.

10 THE COURT: I want an answer to my question, which
11 is do you concede that there are questions that Mr. Orr -- do
12 you concede that there are questions that Mr. Orr should
13 answer about his conversations with the governor even with
14 counsel present?

15 MR. BENNETT: Yeah. It is possible that there
16 was -- it is possible that you could pose a question that
17 does not involve any legal advice and that would not be
18 privileged. I don't know that they did, and I don't think
19 they did. And I want to be very clear about this. No one
20 shut anybody down, but the questions that were asked, at
21 least the ones I remember -- and I'm happy to have --

22 THE COURT: Let me ask Ms. Levine. Would you return
23 to the podium? You can both stand there; right. Can you
24 point to a question that Mr. Orr was asked about a
25 conversation with the governor directly which Mr. Orr was

1 instructed not to answer?

2 MS. LEVINE: Your Honor, maybe it was our mistake
3 during the course of the deposition, but we didn't go through
4 the whole line of questioning having them direct each time
5 for him not to answer. Our understanding was basically that
6 for that period of time, virtually all of the -- we were led
7 to believe that virtually all of the conversations that took
8 place between anybody on behalf of the city and anybody on
9 behalf of the state also included somebody from counsel and
10 that, therefore, there really weren't going to be any
11 conversations that they could discuss with us in the, for
12 example, two weeks leading up to the filing of the Chapter 9
13 petition.

14 THE COURT: Um-hmm, um-hmm.

15 MS. LEVINE: So, you know, we had a limited
16 deposition.

17 THE COURT: All right. So let's just assume that
18 for purposes of resolving this motion the Court needs to
19 resolve the issue of attorney-client privilege and this
20 common interest doctrine.

21 MS. LEVINE: Thank you.

22 THE COURT: All right. So is there anything further
23 you wanted to say on that legal question in the circumstances
24 here?

25 MS. LEVINE: Your Honor --

1 THE COURT: I was asking Mr. Bennett, and then I'll
2 get back to you.

3 MR. BENNETT: I think I may have gotten there
4 already, and I think our papers are clear, but the -- first
5 of all, number one, there is absolutely clearly a common
6 interest concerning what the state wants to achieve with
7 respect to Detroit and what the emergency manager wants to
8 achieve with respect to the City of Detroit, and the entire
9 statutory scheme is one that contemplates that they're
10 working together on some level. And if they're working
11 together on some level, they have to communicate. And if
12 they have to communicate, they clearly have to communicate
13 about legal matters, and those discussions absolutely have to
14 be privileged. Otherwise they're not going to happen, and
15 that would be the worst of all possibilities.

16 THE COURT: I'm not sure why it matters, but are the
17 attorneys that were mentioned here, Mr. Gadola and -- what's
18 the other one --

19 MR. BENNETT: Valerie Brader.

20 THE COURT: Brader?

21 MR. BENNETT: Yes.

22 THE COURT: -- from the attorney general's office or
23 the governor's own like legal counsel, which I don't even
24 know if he has?

25 MR. BENNETT: You got me on that one. I don't know.

1 THE COURT: Anybody know? Mr. Howell.

2 MR. HOWELL: Thank you, your Honor. They are the
3 governor's counsel. They are the chief legal advisor and
4 deputy chief legal advisor to the governor in the governor's
5 office.

6 THE COURT: Thank you. Thank you for that, sir.

7 MR. HOWELL: And it's Michael Gadola and Valerie
8 Brader.

9 THE COURT: Thank you.

10 MR. BENNETT: Okay. The second part is that there
11 was apparently a complaint of when the document actually got
12 done. The truth of the matter is the common interest
13 exception to the waivers of attorney-client privilege may be
14 founded on a verbal agreement, an oral agreement. The cases
15 are crystal clear about that. And that was actually reached
16 way back in March, and I think if we need to demonstrate that
17 further, I believe that we can. I think that the papers are
18 adequate and describe clearly that we meet all of the
19 relevant tests to be able to assert the attorney-client
20 privilege in these circumstances and for the state to be able
21 to assert the attorney-client privilege in these
22 circumstances.

23 THE COURT: Any reply?

24 MS. LEVINE: Your Honor, we'd respectfully submit
25 that there are at least two issues out here where this can't

1 be the right result if, in fact, we're going to have a
2 meaningful inquiry into the facts surrounding a good faith
3 filing. We need to -- we need to be able to question, and we
4 can't have all of the decision-makers shielded by the
5 attorney-client privilege for the two-week period leading up
6 to the bankruptcy filing. In addition --

7 THE COURT: Well, let me ask you about that. Even
8 if I were to agree with you that this is necessary for your
9 inquiry, that there are no other sources of available
10 evidence on these points, is there such an exception to this
11 privilege in law?

12 MS. LEVINE: Well, the answer, your Honor, is
13 twofold. I'm not sure that -- I think that what that does is
14 that takes the privilege out of context. I don't think the
15 privilege needs an exception. I think the problem is this
16 takes the privilege out of context --

17 THE COURT: Um-hmm.

18 MS. LEVINE: -- number one. Number two --

19 THE COURT: Why or how do --

20 MS. LEVINE: -- itself --

21 THE COURT: Okay.

22 MS. LEVINE: -- has shown up in the court in two
23 capacities. Okay. They're here supporting the appointment
24 of the emergency manager and moving forward here, but they're
25 also separately looking into and potentially defending issues

1 related to 436, so --

2 THE COURT: Well, you say the state, but the state
3 is --

4 MS. LEVINE: In and of itself there's an inherent --

5 THE COURT: -- like a lot of different people. I
6 know the attorney general's position might be characterized
7 as you have said. I'm not sure the governor's is.

8 MS. LEVINE: Us either, Judge, and that's the --
9 that's part of the problem. In other words, if what's
10 happened here is all of the decision-making and all of the
11 conversations that would shed light on good faith happen
12 because there's an attorney in the room, we'd respectfully
13 submit that that's an improper use of the privilege. You
14 can't take factual decision-making and make it all -- and
15 make it attorney-client privilege. There has to have been an
16 independent deliberative process by the governor and by the
17 emergency manager with regard to coming to the conclusion and
18 reaching an understanding with regard to why they made
19 those -- the decisions that they made coming up to this
20 process. And for us not to be able to inquire with regard to
21 the nature of the good faith of that decision-making process
22 prevents us from doing the analysis we need to do to
23 determine whether or not the Chapter 9 petition was actually
24 filed in good faith and whether or not the authority as
25 applied was an appropriate application of the authority.

1 THE COURT: Um-hmm. Mr. Bennett, isn't it the case
2 that two individuals, even assuming their legal interests are
3 aligned in any given context -- isn't it the case that they
4 can't shield the conversations between them that would
5 otherwise be discoverable just by having an attorney in the
6 room?

7 MR. BENNETT: That's certainly right.

8 THE COURT: So when is it that the conversations
9 between the two individuals is protected because there is an
10 attorney in the room?

11 MR. BENNETT: When legal issues are being discussed
12 and they're talking about legal -- when they're talking about
13 legal advice or when they're sharing facts for the benefit of
14 the lawyer so that they can get legal advice. The
15 communications that are privileged, as I remember it, are the
16 legal advice itself and the --

17 THE COURT: So if the governor and Mr. Orr are
18 having conversations about the financial necessity to file
19 bankruptcy, is that discoverable even if there's an attorney
20 listening in?

21 MR. BENNETT: If they're talking about the numbers,
22 what are the numbers, that's an easy case for me. You could
23 get discovery as to their conversation as to what the numbers
24 are. If the issue became they're talking about the numbers
25 and they're saying, "Are these numbers numbers that would

1 meet the definition of insolvency as that term has been
2 embellished by the cases -- in the Code and embellished by
3 the cases?" then I think you're talking about conversations
4 that are, in fact, protected and, frankly, questions that no
5 one has got a legitimate interest of inquiring about. The
6 premise, which I think is leading to your questions, that --
7 and which is where Ms. Levine starts, which is inquiry has
8 been foreclosed, is belied by this. We're talking about 12
9 questions in a 150-page -- well, a 400-, 500-page transcript.

10 THE COURT: No, but I have to accept the implication
11 in the fact that Ms. Levine took the time and trouble to file
12 this motion that this is an important inquiry for her, so I'm
13 just going to accept that at face value, but I guess part of
14 what I'm struggling with here -- and I think maybe Ms.
15 Levine, too, is -- if the governor was willing to waive the
16 deliberative process privilege, to the extent there was one
17 and it applied, in order to move this bankruptcy forward on
18 the issue of eligibility, why are there any different
19 considerations here?

20 MR. BENNETT: This is different in kind. The reason
21 we have an attorney-client privilege is because we want the
22 governor to be able to unburden himself and share his
23 innermost doubts, concerns, and legal problems with lawyers
24 to get effective legal advice. And if he does that in front
25 of Mr. --

1 THE COURT: But that's the same premise as the
2 deliberative process --

3 MR. BENNETT: Actually --

4 THE COURT: -- except that it's not with attorneys.
5 It's with others.

6 MR. BENNETT: Well, except when you're -- but the
7 deliberative process is likely more about facts as opposed to
8 exposures which may be the subject of future litigation, and
9 the last thing in the world that I think anyone would have
10 contemplated is if they show up and say, "Well, you know, the
11 governor's private attorneys expressed some substantial
12 doubts about this as part of a presentation of a case before
13 you." I can't imagine that the way our adversary system is
14 supposed to work is supposed to generate those kinds of
15 results in courtrooms.

16 THE COURT: All right. In answer to my -- I'll get
17 to you. In answer to my question of why the governor would
18 waive the deliberative process but not -- the deliberative
19 process privilege --

20 MR. BENNETT: Right.

21 THE COURT: -- but not this privilege, your answer
22 was there is an attorney-client privilege.

23 MR. BENNETT: No. I think -- I didn't say that. I
24 think that --

25 THE COURT: Accepting that --

1 MR. BENNETT: Yeah.

2 THE COURT: -- why would he waive one and not the
3 other if his interest in the waiver of the one was to get to
4 eligibility as efficiently and fairly as possible, which I
5 commend it?

6 MR. BENNETT: He didn't ask me, so this is
7 speculative, but you could say that the deliberative process,
8 to the extent there was debate about numbers, he might say,
9 "Okay. I'm prepared to make that public for the world," or
10 if it's about -- if it's discussions about how I viewed and
11 how other people viewed the city's economic circumstances,
12 how I viewed and how others viewed the state of services that
13 were being -- yeah, there are many, many, many other things
14 that are captured by the deliberative process exception that
15 I can see why a client would decide, okay, I'm prepared for
16 the world to take a look at that, but discussions with
17 counsel about exposures to just put the narrowest possible
18 point on it -- and I don't think it is that narrow, but do I
19 believe for a second that the decision to waive the
20 deliberative process privilege that might open up and
21 illuminate facts and debates about facts, political facts,
22 policy driving facts versus am I going to open up discussions
23 that we had about potential litigation exposures, I think,
24 frankly, those are different in kind, and I see a line.
25 Don't know how I would draw it in every particular instance.

1 THE COURT: Um-hmm. Ms. Levine, anything further?

2 MS. LEVINE: Your Honor, I would just note that one
3 of the things that we've been talking about that makes a
4 difference in the bankruptcy process is that it's a difficult
5 scary fast process, and transparency --

6 THE COURT: It's a what?

7 MS. LEVINE: It's a difficult scary and very fast
8 process, and transparency helps. It just does. It's an
9 understanding how we got here, even if we're wrong in terms
10 of the allegations and the arguments that we've made with
11 regard to our objections to eligibility, learning that
12 through the discovery process or having all the facts
13 presented to your Honor and having your Honor consider that
14 when you're considering eligibility is a better place for a
15 credible bankruptcy process than to say we have the code of
16 silence. We're not going to tell you how or why we made
17 these decisions to file. We're not going to tell you how or
18 why we discussed these decisions between the city and the
19 state, and we're going to hide behind a privilege and then
20 determine that because you can't show any issues with regard
21 to eligibility, the only thing that stands is our analysis
22 with regard to why we are eligible.

23 THE COURT: Well, privilege always suppresses the
24 truth, doesn't it?

25 MS. LEVINE: Your Honor, it's -- but the discussions

1 that we're talking about are the discussions between the
2 state and the city. We're not talking about Mr. Orr having a
3 one-on-one conversation with Jones Day or the governor having
4 a one-on-one consultation with his counsel. We're talking
5 about the process that took place leading up to the timing
6 and the understanding of why the eligibility -- why the
7 bankruptcy was filed when it was filed and how it was filed
8 and what the rationale was for filing at that point in time.
9 It's the who, what, where, when. Those are the basic types
10 of facts that you look to in making a decision with regard to
11 good faith and bad faith.

12 THE COURT: All right. Thank you. Who else wanted
13 to be heard? Mr. Howell again, and then I'll get to you,
14 sir. Seriously, I promise you.

15 MR. HOWELL: Thank you, your Honor. Again, Steven
16 Howell appearing on behalf of the state. Just a couple
17 things in response to your questions. In the deliberative
18 process privilege and the decision to waive that, one of the
19 factors in coming to that conclusion was that was to ask the
20 governor why he made the decision he made, what factors
21 influenced him, what he based his decision on outside of
22 attorney-client privilege are questions that can be asked, it
23 seems to me, and his deliberations in coming to the
24 conclusion, and it seems to me that's what they want to know
25 is how -- you know, what was the governor's conclusion and

1 what -- you know, what made him come to that conclusion. And
2 outside of the attorney-client privilege, those questions can
3 be asked and answered it would seem to me. But when you get
4 to the attorney-client privilege, the whole core to that is
5 that you have to be able to have open and candid discussions.
6 You have to weigh the alternatives. You have to look at the
7 risks, and you have to know that that discussion with your
8 counsel is protected. Now, when you carry that over to the
9 common interest --

10 THE COURT: But that's a -- that strikes me as a
11 gross overstatement of the privilege.

12 MR. HOWELL: Well --

13 THE COURT: I mean all of that only works if the
14 questions are legal questions.

15 MR. HOWELL: Are legal. I was going to make that
16 point, your Honor.

17 THE COURT: Okay.

18 MR. HOWELL: I'm not trying to argue that this is
19 outside of that, but what I'm saying is that the workings
20 between the governor's office and the emergency manager under
21 the statute, under the bankruptcy are very close. They have
22 to work together. There are instances, in fact, where the
23 state is obligated to defend the emergency manager in certain
24 actions that he takes. He's appointed by the state. I mean
25 the relationship and the common interest is clear and

1 unquestioned. The only thing we're trying to protect is the
2 obtaining of legal advice and the belief that the common
3 interest is an extension of the attorney-client privilege and
4 that when those interests are common and you're working
5 together in dealing with those issues -- and they are legal
6 issues -- that that is protected, your Honor.

7 The only other point I'd like to make is there was
8 an argument relative to waiver as to the state, and that, you
9 know, was raised in the motion filed yesterday. And I would
10 just say the motion that was filed to quash was to
11 significantly limit, if not stop some of the discovery on
12 arguments that were made. It did not then go into a whole
13 lot of other privileges that are driven by questions or
14 particular documents, and, in fact, the motion to quash
15 specifically referenced that and said this -- you know, we
16 reserve on -- in paragraph 7 of the motion to quash, we
17 reserve on privileges for a later date, and those privileges
18 were reserved in that motion originally. And when the
19 discussions took place and there was, in fact, an agreement
20 reached, dates were set, and we're working on that trying to
21 finalize the order, and productions will occur, and at that
22 point logs will be turned over and documents will produce and
23 issues will be raised at that point but not the deliberative
24 process. And in that discussion we said the deliberative
25 process, but all others were reserved. And the primary one

1 that we're concerned about here today is the attorney-client
2 privilege, and we believe that that is very important. It is
3 legal issues, and it is legal issues discussed with counsel
4 among the two teams that are trying to take this case forward
5 and trying to bring this to a successful conclusion, your
6 Honor. Thank you.

7 THE COURT: Sir.

8 MR. CIANTRA: Thank you, your Honor. Very briefly,
9 Thomas Ciantra, Cohen, Weiss & Simon, here for the UAW. We
10 join in the motion that AFSCME has made, and I just wanted to
11 draw attention to a couple of particular points. One, I
12 believe that the city and now the state have grossly
13 overstated the scope of the common interest doctrine. All
14 right. The case law, we think, which is set out in the
15 Libbey Glass case that's cited in AFSCME's papers makes it
16 very clear that the common interest that has to be involved
17 is a common interest, a common legal interest. It is not
18 sufficient to rely upon the common interest that the state
19 and the emergency manager are looking to achieve with respect
20 to the overall restructuring of the City of Detroit's
21 finances. It's a much more limited doctrine. And the
22 limited scope of that doctrine we submit is particularly
23 important here because of the public interest in the
24 transparency of government decision-making that is involved
25 here and that had been placed in issue by the objections to

1 eligibility that the UAW has filed and that other parties
2 have filed in this case, so the scope of that exception is
3 very critical because what -- it seems from our perspective
4 that what is the common interest here is in shielding those
5 discussions, in shielding those directions, in shielding the
6 course of action that was decided upon.

7 Second point that I just wanted to briefly make is
8 that this issue is not only with respect to a dozen questions
9 that were raised at Mr. Orr's deposition. Reference was made
10 earlier to document production in this case. Last Friday we
11 received literally tens of thousands of pages of documents
12 that were produced by the city on an expedited basis.
13 Obviously we have not received a privilege log. One could
14 not expect that. However, I would expect, based on the
15 position that the city has taken, that that log is going to
16 be very long and detailed indeed because we are certain that
17 there are multiple documents, e-mail communications, memos,
18 other things that would have passed between these parties
19 that would be comprised by this, so it's not just a question
20 of a discrete number of questions asked in a deposition. It
21 really goes to the heart and soul of the eligibility
22 objections that have been raised. Thank you.

23 THE COURT: Thank you.

24 MS. GREEN: I will also be brief. Jennifer Green on
25 behalf of the General and Police and Fire Retirement Systems.

1 Speaking of the privilege log, there was a privilege log
2 produced on Friday, September 13th. There were just under
3 11,000 documents that are claimed to be privileged. Out of
4 those 11,000 documents, we have so far determined that there
5 are roughly 400 to 600 documents that they are claiming are
6 protected by the common interest privilege.

7 On Monday, during Mr. Orr's deposition, the city
8 appeared to limit this common interest privilege to -- and
9 I'm going to quote from the deposition -- "what Mr. Orr has
10 been doing since he became emergency manager where there was
11 a common interest between the state and the emergency
12 manager's office," and I believe today counsel limited it to
13 that as well. And we all know the emergency manager was not
14 appointed until March of 2013. The Chapter 9 proceeding
15 obviously began in July of 2013. The privilege log, however,
16 asserts the common interest privilege as far back as December
17 15th of 2011, well before the emergency manager was ever
18 appointed, and so that raises a concern about whether or not
19 this privilege is being abused and whether it's being
20 asserted too broadly.

21 Today in the papers filed by the city they have
22 characterized the common interest between the city and the
23 state as, quote, "they share a common interest in rectifying
24 the financial emergency of the city," which may be a
25 political or may be a commercial interest, but I don't think

1 that that's necessarily a legal interest that they share in
2 common.

3 The other thing that's of concern is in the
4 privilege log these communications are -- there are some that
5 are without any counsel between -- it'll be, for instance,
6 Andy Dillon, the state treasurer, or Richard Baird, who is
7 not even a state employee. My understanding is he is a
8 consultant who is -- has some sort of contract with either
9 the State of Michigan or with the governor, and he's all of a
10 sudden part of this common interest privilege, so that is our
11 concern. And while we concur with AFSCME's motion and
12 support the relief requested today, there may be another
13 issue relating to these documents that may need to be raised
14 with the Court at an appropriate time, and we would like to
15 ask that today's ruling perhaps be without prejudice in case
16 we need to file a motion to compel on the documents
17 themselves. We would obviously like to raise the issue with
18 the city. Perhaps we can work something out without having
19 to involve the Court --

20 THE COURT: Okay.

21 MS. GREEN: -- before that. One last thing
22 dovetailing with what the UAW mentioned. There is a Sixth
23 Circuit case called Reed versus Baxter -- it's 134 F.3d 351,
24 1998 case -- that talks about the need to prevent the abuse
25 of the attorney-client privilege where it is a governmental

1 entity or a governmental actor that is asserting it. And in
2 that case they say that courts and commentators have
3 cautioned against broadly applying the privilege to
4 governmental entities. The recognition of a governmental
5 attorney-client privilege imposes the same costs as are
6 imposed in the application of the corporate privilege but
7 with an added disadvantage. The governmental privilege
8 stands squarely in conflict with a strong public interest in
9 open and honest government. And that's sort of what we face
10 here is, you know, we have questions about decisions that
11 were made the day of the filing, and we asked questions about
12 were contingencies discussed, did you and the governor have a
13 meeting on July 18th, and they said, "Well, counsel was
14 there. We're not answering."

15 THE COURT: No, but pause there. Does that Sixth
16 Circuit case impose any identifiable functional restriction
17 on the attorney-client privilege in the context of a
18 governmental officer claiming it?

19 MS. GREEN: In that case it was -- I believe there
20 was a city council member and another officer of the city,
21 and the Court said your legal interests were not identical.
22 They were not aligned. And in this case, even if their
23 political or maybe commercial interests were aligned, it's
24 not necessarily clear that their legal interests were
25 aligned, and that would be our objection.

1 THE COURT: All right.

2 MS. GREEN: Thank you, your Honor.

3 THE COURT: All right. I'm going to take this under
4 advisement and come back into court at 5:15 with a decision.

5 THE CLERK: All rise. Court is in recess.

6 (Recess at 4:54 p.m., until 5:31 p.m.)

7 THE CLERK: Court is in session. Please be seated.

8 THE COURT: The record should reflect that counsel
9 are present. The Court concludes that the common interest
10 doctrine does apply in these circumstances. The Court so
11 concludes based on this analogous hypothetical. As we all
12 know, when a corporation files bankruptcy, its board of
13 directors must give its consent, must authorize the filing.
14 Ordinarily, of course, the corporation itself would have its
15 own counsel giving it advice on whether to file bankruptcy,
16 what the ramifications would be, what possible reasons there
17 might be not to file bankruptcy, et cetera, et cetera.
18 Ordinarily the board of directors would not have its own
19 separate counsel in that process. It would rely on corporate
20 counsel, but it could. A board of directors could hire
21 special counsel to advise it on whether to authorize the
22 filing or not. Assume for a moment it did, and then the
23 board or members of the board, its lawyer, the corporation's
24 lawyer and corporate management all met together. It seems
25 clear enough to this Court that the common interest doctrine

1 would shield those conversations even though technically the
2 corporate attorney does not represent the board and the
3 board's attorney does not represent the corporation. The
4 Court cannot identify any way to distinguish that case from
5 our case.

6 Now, having come to that conclusion, that does not
7 mean that every question that Ms. Levine or others want to
8 ask of Mr. Orr in this case is protected by the attorney-
9 client privilege, and here it becomes hard for -- really
10 impossible for the Court to rule specifically. I can give
11 you some general guidance, and I'm willing to do that, but
12 the application of the attorney-client privilege can only be
13 adjudged on a question-by-question basis.

14 Here's the general guidance I'm willing to give to
15 you, for what it's worth, and then an offer. If the
16 conversations among the governor, the governor's lawyers,
17 Mr. Orr, and/or Mr. Orr's lawyers were for the purpose of
18 seeking legal advice from the lawyers about the bankruptcy,
19 then it's protected. If the conversations were, for example,
20 between Mr. Orr and Mr. Snyder for other purposes, for
21 example, to discuss the political ramifications of the
22 bankruptcy or for other purposes I'm too naive to fathom,
23 then it would, it seems to the Court, not be protected by the
24 attorney-client privilege. And I don't know what more to
25 tell you at this point except to make to you the offer I

1 think I made to you before, which is when you're sitting in a
2 deposition and you come to a disagreement about whether the
3 privilege applies to a specific question, you can get me on
4 the phone, and I will resolve it on the spot if I at all can,
5 but I make that offer with the caveat that the guidance that
6 I just gave you is probably the guidance I'm going to follow,
7 and you can figure it out as well as I can, so I don't know
8 what more to say except that sort of technically the motion
9 to compel that's before the Court is granted in part and
10 denied in part. I will allow a further opportunity with the
11 guidance that I've given you for Mr. Orr's deposition. I'm
12 sure you'll be able to find a mutually convenient time for
13 that.

14 Is there anything else I can help you with here
15 today?

16 MS. LEVINE: Thank you, your Honor.

17 THE COURT: All right. We'll be in recess then.

18 THE CLERK: All rise. Court is adjourned.

19 (Proceedings concluded at 5:36 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

September 26, 2013

Lois Garrett